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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| **In the Matter of** | ) | |
| | ) | |
| **Implementation of Infrastructure** | ) | **CC Docket No. 96-237** |
| **Sharing Provisions in the** | ) | |
| **Telecommunications Act of 1996** | ) | |

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# BELLSOUTH COMMENTS


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## SUMMARY

BellSouth strongly supports the Commission's tentative conclusion that Section 259-derived arrangements should largely be the product of negotiations between the parties. The Commission can best fulfill its statutory responsibilities under this section by limiting the extent of its regulation to the articulation of general rules and guidelines.

Although Section 259 is an integrated part of a complete statutory framework, it is distinct from, and serves a different purpose than, other aspects of the 1996 Act. Indeed, the Commission has already recognized that Section 259 differs materially from provisions whose primary purpose is to foster competition between LECs and is instead a provision designed to accommodate the universal service benefits of advanced infrastructure for customers whose carriers otherwise lack necessary economies of scope or scale. Moreover, because Section 259 serves this special purpose, incumbent LECs are not required to make the terms of Section 259 agreements available to competing or nonqualifying LECs.

BellSouth supports the Commission's proposal to establish a rebuttable presumption that carriers meeting the Act's definition of "rural telephone company" lack necessary economies of scope or scale and therefore may be "qualifying carriers." Beyond this, however, the Commission should not impose conditions or limitations on the definition of qualifying carrier.

The Commission need not establish an exhaustive list of infrastructure components that "must" be shared. Nor should the Commission attempt to draw analogies to Section 251 to try to identify infrastructure subject to sharing or the terms under which it might be shared. Parties to an infrastructure sharing agreement are better able to make those determinations.

Finally, the Commission need not adopt another layer of network disclosure rules peculiar to Section 259 to ensure that qualifying LECs participating in infrastructure sharing agreements have access to "timely information" regarding network changes. Existing rules are adequate to ensure that such information is available.

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## BELLSOUTH COMMENTS

BellSouth Corporation, on behalf of BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, hereby submits these Comments in response to the Commission's Notice of Proposed Rulemaking[1] in the above referenced docket.

This proceeding is one of many initiated by the Commission to fulfill its responsibilities under the Telecommunications Act of 1996.[2] In the instant proceeding, the Commission has proposed regulations to implement Section 259 of the Communications Act of 1934.[3] Section 259 imposes on incumbent local exchange carriers ("LECs") an obligation to share their public switched network infrastructure with noncompeting, qualifying LECs who, in the absence of such sharing, would be unable to capture the economies of scope or scale presented by such infrastructure. As the context of Section 259 makes clear, and as USTA's comments filed contemporaneously herewith reaffirm, this section was intended to support Congress's universal

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[1] *Notice of Proposed Rulemaking,* FCC 96-456 (rel. Nov. 22, 1996) (*"Notice"*).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the 1996 Act").

[3] The Communications Act of 1934, as amended, 47 U.S.C. §§ 259, *et seq.* ("the 1934 Act" or "the Act").

service objectives in the 1996 Act by ensuring the continuation of publicly beneficial relationships between noncompeting local exchange companies. Section 259 thus operates in complement with, but is distinct from, those provisions of the 1996 Act that govern relationships between competing LECs.

Particularly because Section 259 addresses relationships between noncompeting LECs, BellSouth strongly supports the Commission's tentative conclusion that "Section 259-derived arrangements should be largely the product of negotiation among the parties"[4] and agrees that the Commission's can best fulfill its statutory responsibilities by limiting the extent of its implementing regulation to the articulation of "general rules and guidelines."[5] In these Comments, BellSouth addresses certain of the Commission's questions and proposals in the *Notice* with these objectives in mind.

## I. The Relationship Between Section 259 and Other Provisions of the 1996 Act.

Through out the *Notice*, the Commission attempts to draw comparisons between Section 259 and other provisions of the 1996 Act as the starting point for development of regulations under Section 259. Although BellSouth concurs that Section 259 is an integrated part of a complete statutory framework, it is distinct from, and serves a different purpose than, other aspects of the 1996 Act. Thus, BellSouth encourages the Commission, as it endeavors to adopt regulations to implement Section 259, to remain mindful not only of the commonality of Section 259 and other sections, but also of their differences. Indeed, it is the differences rather than the similarities that shed the most light on Congress's intent when adopting Section 259.

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[4] *Notice* at ¶ 7.

[5] *Id.*

Even before initiation of this proceeding, the Commission has had occasion to compare the scope and purpose of Section 259 with those of other sections of the 1996 Act. In the *Local Competition First Report and Order*,[6] the Commission thus observed:

> Section 259 is limited to agreements for infrastructure sharing between incumbent LECs and telecommunications carriers that lack "economies of scale or scope." . . . We conclude that the purpose and scope of Section 259 differ significantly from the purpose and scope of section 251. Section 259 is a limited and discrete provision designed to bring the benefits of advanced infrastructure to additional subscribers, in the context of the pro-competitive goals and provisions of the 1996 Act.[7]

In short, the Commission has already recognized that Section 259 differs materially from provisions whose primary purpose is to foster competition between LECs and is instead a provision designed to accommodate the universal service benefits of advanced infrastructure for customers whose carriers otherwise lack necessary economies of scope or scale.[8]

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[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, 61 Fed. Reg. 45476 (rel. Aug. 8, 1996) ("*Local Competition First Report and Order*"), partially stayed pending appeal *sub nom Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir., Oct. 15, 1996).

[7] *Local Competition First Report and Order,* at ¶ 169 (citations and footnotes omitted).

[8] That Section 259 serves a disparate purpose from Section 251, 47 U.S.C. § 251, is most clearly reflected in Section 259(b)(6). While Section 251 imposes on incumbent LECs the obligation to provide opportunities for interconnection, resale, or access to unbundled elements to requesting carriers specifically to facilitate those carriers' abilities to compete with the incumbent, Section 259(b)(6) expressly directs the Commission to refrain from requiring infrastructure sharing under Section 259 to carriers that would use such an arrangement to compete with the providing LEC. *See* 47 U.S.C. § 259(b) ("The regulations prescribed by the Commission pursuant to this section shall -- . . . (6) not require a local exchange carrier to which this sections applies to engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area.").

Consistent with this past recognition of the differences between Section 259 and other provisions of the Act, BellSouth encourages the Commission to avoid attempting to implement Section 259 as if it were designed to serve the same purpose as other sections. Clearly, while Section 259 should not be implemented in a manner that necessarily interferes with the pro-competitive objectives of other provisions of the Act, neither should it be implemented as if competition were its primary purpose. BellSouth urges the Commission to be cautious not to let its philosophies and assumptions regarding competition introduce unwarranted tensions into parties' abilities to negotiate economically reasonable noncompetitive relationships for infrastructure sharing.

Notwithstanding the distinctions between Section 259 and Section 251, however, the Commission should recognize that incumbent LECs are not precluded from negotiating the same agreement with competing and noncompeting LECs. Indeed, in some circumstances a noncompeting LEC may not be a "qualifying carrier" for purposes of Section 259, such as if the noncompeting LEC is not lacking in economies of scope or scale with respect to a particular technology or infrastructure, but nevertheless desires to realize benefits of an interconnection agreement that the incumbent LEC has already offered to carriers that do compete with the incumbent. The incumbent LEC is not precluded by either Section 251 or 259 from offering such an arrangement to a noncompeting LEC.[9] In fact, at such a point, the requesting LEC's classification as competing or noncompeting becomes irrelevant because the requesting carrier is

[9] The converse is not true. An incumbent LEC clearly is not required to make Section 259 agreements (or terms thereof) negotiated with noncompeting, qualifying carriers available to competing or nonqualifying carriers. To conclude otherwise would be to ignore the plain language of Sections 259(b)(3) and (b)(6), in particular, and effectively to render Section 259 meaningless.

able to enter an agreement that is available to all requesting carriers and that is not premised on a condition that the requesting carrier not compete with the incumbent. Thus, an incumbent LEC is not precluded from entering into a Section 251 agreement with another LEC that might also be eligible to enter a Section 259 agreement. Nor would the existence of a Section 251 agreement between an incumbent LEC and a requesting carrier preclude the negotiation of a separate or more limited Section 259 agreement between the same carriers.

## II. Regulations Under Section 259

The Commission is charged under Section 259 to adopt regulations that will help achieve the universal service objectives of that section. Specifically, the Commission is directed to

> prescribe . . . regulations that require incumbent local exchange carriers . . . to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 214(e).[10]

In the *Notice*, the Commission has proposed to fulfill this obligation, first, by suggesting clarifications of certain aspects of the Act regarding identification of the carriers and infrastructure covered by Section 259 and, then, by addressing certain details of the obligations of carriers providing infrastructure sharing opportunities under the Act. BellSouth responds to several of these issues below.

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[10] 47 U.S.C. § 259(a).

### A. "Qualifying Carrier"

The rights and obligations granted and imposed by Section 259 inure to the benefit of "qualifying carriers." Section 259 contains its own definition of carriers that "qualify" under this section. However, Section 259(d), which defines "qualifying carrier," partially defers to regulations to be adopted by the Commission to complete that definition. In the *Notice*, the Commission proposes to address that responsibility.

In particular, Section 259(d) defines a "qualifying carrier" as

> a telecommunications carrier that --
> (1) lacks economies of scale or scope, as determined in accordance with regulations prescribed by the Commission pursuant to this section; and
> (2) offers telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carriers under Section 214(e).[11]

Thus, the Commission is charged with prescribing regulations to determine whether a carrier lacks economies of scale or scope.

BellSouth supports the proposal suggested in the *Notice* that the Commission rely on a rebuttable presumption as the initial means of designating a class of companies that lack economies of scope or scale.[12] Such a rebuttable presumption offers significant administrative convenience to an identification process that could otherwise become tediously complex.

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[11] 47 U.S.C. § 259(d).

[12] *Notice* at ¶ 37.

BellSouth also supports the proposal[13] that the rebuttable presumption operate in favor of those carriers that are within the limitations on service area and access lines set forth in the definition of "rural telephone company" in Section 3(37) of the Act.[14] Not only is a presumption based on this definition of rural telephone company administratively convenient, it also comports with the reasonable expectation that carriers meeting this definition are less likely, absent a sharing arrangement, to experience the same economies of scale or scope as do larger carriers.[15]

Beyond the satisfaction of its statutory charge by adoption of a rebuttable presumption to identify carriers that lack economies of scope or scale, however, the Commission should refrain from imposing additional qualifications or limitations on carriers that may be "qualifying carriers" and entitled to benefit under Section 259. Thus, for example, the Commission should resist the temptation evinced in the Notice to establish firm thresholds, such as any based on a carrier's size, as a means of defining "qualifying carriers."[16] Nor should the Commission impose an "adjacency" requirement.[17] Nothing in Section 259 suggests that a carrier otherwise meeting the definition of

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[13] *Id.*

[14] 47 U.S.C. § 3(37).

[15] Such a presumption would not be as warranted for larger carriers who might be expected to be able to experience certain economies of scope or scale even without a sharing arrangement. However, adoption of a presumption for carriers meeting the rural telephone company definition would not exclude other carriers who do not meet that definition, but who nonetheless lack economies of scope or scale in a particular context, from entering infrastructure sharing agreements under Section 259.

[16] *Notice* at ¶ 12.

[17] *Id.*

"qualifying carrier" in Section 259(d) should also have to meet additional criteria of the Commission's choosing to secure the benefits of Section 259.[18]

Finally, the Commission should confirm, first, that the burden is on, and remains on, the requesting carrier to support its contention that it is a "qualifying carrier" under Section 259 for purposes of the infrastructure sharing agreement it desires to enter and, second, that the providing LEC is entitled to rely on that contention for purposes of entering a Section 259 agreement. This is particularly important to avoid exposing incumbent/providing LECs to claims that a purported Section 259 agreement is in fact something else due to the requesting carrier's failure to attain or maintain "qualifying carrier" status and that the agreement therefore is not excluded from common carrier obligations by Section 259(b)(3). At a minimum, the Commission should confirm that a providing LEC has the right to terminate any infrastructure sharing agreement reached under Section 259 if the requesting LEC fails to meet the criteria of a "qualifying carrier."

### B. Infrastructure Subject to Sharing

Section 259(a) obligates incumbent LECs to make available to qualifying LECs "such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier." In the *Notice*, the Commission solicits comment, as an "initial matter," on what is included in this phrase, speculating that "how these terms are defined has specific implications for the overall scope of Section 259 and how

[18] Indeed, Section 259(a) requires an incumbent LEC to make its infrastructure available to "*any* qualifying carrier." 47 U.S.C. § 259(a) (emphasis added). Once having met the statutory requirements for a "qualifying carrier," as expounded only by the Commission's determinations regarding presumptions or showings of economies of scale or scope, any local exchange carrier is entitled to request infrastructure sharing from an incumbent LEC pursuant to the terms of Section 259.

Section 259 relates to other sections of the 1996 Act."[19] From there, the Commission attempts to draw comparisons between the "telecommunications facilities and functions" clause above and resale of services or other obligations under Section 251(b). BellSouth believes that such an analysis is an unwarranted exercise.

As an "initial matter," there is no need for the Commission to enumerate an exhaustive list of infrastructure components that may be the subject of Section 259 agreements. The structure and purpose of Section 259 obviate such a need through the overt reliance on negotiation and cooperation[20] between noncompeting parties[21] to achieve infrastructure sharing agreements that are not economically unreasonable.[22] Thus, parties' own interests will drive them to agree upon the infrastructure components to be shared consistent with the objectives of Section 259. Attempts to identify in the abstract infrastructure components that "must" be shared would only operate to introduce unnecessary and potentially counterproductive influence on the negotiation process. Congress clearly did not anticipate or intend such a consequence.

Nor is the direction of the Commission's proposed analysis appropriate. The Commission first erroneously dissects Congress's inclusive statement of infrastructure subject to sharing into discrete components: "public switched network infrastructure, [and] technology, [and] information, and telecommunications facilities and functions." Then, asserting that the clause "telecommunications facilities and functions" is "stated without terms of limitation," the Commission suggests that that clause may give rise to obligations that equate to the resale

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[19] *Notice* at ¶ 9.

[20] 47 U.S.C. § 259(b)(5).

[21] 47 U.S.C. § 259(b)(6).

[22] 47 U.S.C. § 259(b)(1).

obligations under Section 251.[23] This parsing of Congress's language is improper from both a plain language and statutory construction perspective.

First, the Commission offers no explanation of its fragmented and strained reading of the public switched network components that are subject to Section 259 agreements. The more straightforward reading establishes "public switched network" as a modifier or "term of limitation" that applies equally to each of the four categories of components.[24] Nor does the open ended reading suggested in the *Notice* comport with the purpose of Section 259. As noted above, Section 259 is intended and designed to "enabl[e] . . . qualifying carrier[s] to provide telecommunications service" in their service areas.[25] No mention is made of an ability or opportunity to sell services provided by another carrier. Accordingly, BellSouth urges the Commission to refrain from attempting to introduce a resale obligation into the infrastructure sharing obligations of Section 259.

### C. "Action That is Economically Unreasonable or Contrary to the Public Interest"

Although Congress directed the Commissions to establish regulations to implement Section 259, Congress imposed certain very specific limitations on the regulations the

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[23] *Notice* at ¶ 10.

[24] Indeed, were the clause "public switched network" deemed to be a modifier only of "infrastructure" in subsection 259(a) where the two phrases appear adjacent to one another, but not a modifier of the other phrases in the series, the Commission's logic necessarily would beg the question whether "infrastructure" is similarly not subject to any "term of limitation" where it appears in the same series in other subsections, but without the predicate "public switched network" clause. *See, e.g.,* Section 259(b)(3) referring to "*any* infrastructure, technology, information, facilities, or functions." BellSouth does not believe Congress would have intended its requirements under Section 259 to turn on such tortured grammatic construction.

[25] 47 U.S.C. § 259(a).

Commission might prescribe. Among the constraints under which the Commission must operate is the admonition that its regulations "shall not require a local exchange company to which this section applies to take any action that is economically unreasonable or that is contrary to the public interest."[26] In the *Notice*, the Commission seeks comment on how to determine whether an action is economically unreasonable or not in the public interest.

BellSouth believes in the first instance that the most effective means of ensuring that an action is not economically unreasonable is to rely on the parties to decide between themselves whether a proposed action would be economically unreasonable. This is the natural course of a negotiated agreement and is the method most likely to achieve results that are in the public interest.

In addition, BellSouth supports the Commission's tentative conclusion that any action that denies a providing carrier a right and opportunity to recover its costs would be economically unreasonable.[27] Providing carriers also should not be precluded from earning a return on the investment tied up in the shared infrastructure; otherwise the carrier would suffer the opportunity cost associated with such investment. BellSouth also agrees that providing carriers should not be obligated to develop, purchase or install network infrastructure, technology, facilities or functions solely on the basis of a request from a qualifying carrier.[28] Such a requirement could unreasonably impinge on a providing carrier's ability efficiently to manage its own network needs, consequently raising costs for all the involved carriers.

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[26] 47 U.S.C. § 259(b)(1).

[27] *Notice* at ¶ 20.

[28] *Id.*

BellSouth also urges the Commission not to restrict providing carriers' abilities to withdraw from sharing agreements that are no longer economically reasonable or that are not in the public interest. Thus, for example, providing carriers clearly should be permitted to terminate a relationship with a qualifying carrier upon discovering that the qualifying carrier is using the shared infrastructure to compete in the providing carrier's service area. Similarly, providing carriers should be permitted to enforce contractual terms that prohibit a qualifying carrier from reselling shared infrastructure to a carrier that competes with the providing carrier. Such an arrangement would be contrary to the purpose and intent of Section 259 and not in the public interest.

### D. "Fully Benefit"

Section 259(b)(4) obligates the Commission to adopt regulations that ensure that the terms and conditions of any agreement under Section 259 permit the qualifying carrier to "fully benefit" from the economies of scale and scope of the providing carrier. The Commission solicits comment on the meaning of the clause "fully benefit." In particular, the Commission inquires whether this provision suggests that the Commission can or should establish pricing guidelines for infrastructure sharing agreements.

As an initial matter, BellSouth does not believe that the foregoing provision was intended to signal the Commission to establish pricing guidelines or standards. As other provisions of the Act make clear, where Congress believed pricing standards under the 1996 Act were warranted, Congress provided for them expressly. Section 259 contains no such pricing provisions.

Moreover, the "fully benefit" clause is more appropriately considered in the context of the benefits of the providing LEC's economies of scope and scale that the qualifying LEC can pass along to its customers rather than in the context of the prices the providing carrier charges to qualifying LECs. Thus, a qualifying LEC should be considered to fully benefit from the providing LEC's economies of scope or scale if the sharing arrangement causes the qualifying LEC to incur costs that allow it to charge its customers prices reasonably comparable to those charged by the providing LEC for comparable services.[29] Naturally, parties to an agreement will be in the best position to determine whether the particular agreement provides such benefit to the qualifying LEC. Accordingly, the Commission should refrain from attempting to develop in the abstract mechanisms for quantification of benefits that may be derived from a providing LEC's economies of scope or scale merely so that debates can be had over whether any quantified level constitutes "full" benefits.

**E. No Common Carrier Obligation**

The Commission properly concludes in the *Notice* that pursuant to Section 259(b)(3), Section 259 agreements are not common carrier offerings and thus are not subject to Title II regulation, including nondiscrimination obligations.[30] Nonetheless, the Commission questions whether the obligation imposed by Section 259(a) that incumbent LECs make infrastructure sharing available to "*any* qualifying carrier" reflects an inherent nondiscrimination principle and whether the Commission should require incumbent LECs to make the same sharing arrangements

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[29] Of course, in some cases, a qualifying carrier may have to incur additional costs to obtain the benefits of the shared infrastructure, such as for additional transport facilities. Under no circumstance should the providing LEC be obligated to charge the qualifying LEC rate for the shared infrastructure that is below the providing LEC's costs merely to offset the effects of the qualifying LEC's added costs. Such an arrangement would constitute an undue subsidy rather than a shared scope or scale economy and is not contemplated by Section 259.

[30] *Notice at ¶ 22.*

available to similarly situated qualifying carriers on the same terms.[31] Any such inference, however, would be contrary to the express provisions of Section 259(b)(3) and must be rejected.

Section 259(a) does not suggest any nondiscrimination obligation with respect to the terms or conditions under which a providing LEC makes available its infrastructure. Rather, it only indicates *to whom* such infrastructure must be available under whatever terms are otherwise consistent with the remainder of Section 259. As a practical matter, of course, the obligation to enter agreements "on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale or scope of such local exchange carrier"[32] is likely to drive many agreements to contain a substantial degree of sameness. However, Section 259(b)(3) expressly forbids the Commission from achieving such a result through imposition of any common carrier regulation of such agreements.

### F. Information Disclosure

Section 259(c) obligates any providing LEC to make available to any party to a sharing agreement "timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment."[33] In the *Notice*, the Commission notes that this obligation is similar to that already imposed under Section 251(c)(5) and suggests that the requirements could be "harmonized" to reduce administrative duplication.[34]

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[31] *Id.*

[32] 47 U.S.C. § 259(b)(4).

[33] 47 U.S.C. § 259(c).

[34] *Notice* at 29-32.

BellSouth concurs that reduction of administrative duplication for requirements that are substantively similar is a desirable objective. Qualifying carriers, whether parties to a Section 259 agreement or not, will already have access to information that incumbent local exchange companies must make publicly available under existing disclosure requirements and vehicles. Accordingly, BellSouth believes there is no need for the Commission to develop a set of disclosure rules or principles peculiar to Section 259.

## CONCLUSION

BellSouth urges the Commission to adopt regulations to implement Section 259 of the Act consistent with the discussion above.

Respectfully submitted,

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